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Challenges in Cyberspace

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Challenges in Cyberspace

By Leonard D. DuBoff*
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The World Wide Web has provided incredible communication opportunities. By merely posting an item on a computer in your home or office, you can have it transmitted around the globe. There are, however, numerous challenges presented by this modern process.

Many creative people feel that anything found on the Web is available for them to use and exploit in any way they desire. Indeed, a prominent law professor, Lawrence Lessig, co-founder of Creative Commons, espouses the theory that free use of others' materials fosters creativity. Unfortunately, this belief is not consistent with the law in many countries. It presents a clash of rights between the creators of a work and those who wish to freely use it.

One of the ways in which this collision of rights may occur is when a scholar finds an interesting article written by somebody else, reproduces that article on his/her own website and provides hyperlinks for particular portions of that article. For example, if a teaching technique is discussed, a link may be inserted so as to showcase an example of that teaching technique by directing the reader to another website when the name of the technique is clicked. Similarly, a link may be used to provide a more expanded explanation of a particular concept. Links may also be used for the purpose of having pictorial illustrations of materials discussed.

This situation, in which hyperlinks are added to somebody else's article, should be distinguished from the common practice of adding links to one's own work. Just as scholars legally add footnotes referencing the works of other scholars to books or articles they themselves have written, in most instances, adding a hyperlink directing the reader to another's website for purposes of citation or providing a more detailed explanation is not a problem according to case law.

The situation discussed here is different. A scholar copying someone else's article to his or her own website and then adding hyperlinks to that article appears more analogous to a person republishing another author's book after adding footnotes to it.

Is this use of another's article without permission legal? Is the addition of hyperlinks for the purpose of explanation or illustration legal?

These are the kind of questions which are now being presented by the expanded opportunities available in cyberspace.

Focusing on the law of the United States, since that is the jurisdiction in which the Berglund Center is located, we begin the analysis by reviewing US copyright law. Section 106 of that statute sets forth "the bundle of rights" that are provided to the copyright owner in this

country. Among those rights are the right to make reproductions of the copyrighted work and the right to create derivative works. When the researcher reproduces an article found on the web without first obtaining permission from the copyright owner, the researcher may be creating an unauthorized copy of the protected work in violation of one of the copyright owner's exclusive rights. Unless there is some exception available for this unauthorized reproduction, the copying would be an unlawful infringement.

One of the most common exceptions available, the "fair use doctrine," is found in section 118 of the statute. This section of the law provides that a use that might otherwise be deemed infringing and unlawful will be a permitted "fair use" in certain circumstances. The law provides that at least four factors must be considered in order to determine whether the use is "fair."

First, the nature of the use must be evaluated. If the use is "productive," such as writing a book review using quotes from the book, the use is likely to be fair. If, on the other hand, the work is merely reproduced in order to satisfy a need for that work, it is likely not. Second, the character of the work must be considered. Using a quote from a book of quotable quotes would likely be permitted while reproducing a workbook, which is a consumable, would probably not. Third, the extent of copying should be evaluated. Copying a little bit is likely permissible, while reproducing the entire work, or the most important part of a work, is probably not. Finally, the effect that the copying has on the copyright owner's market must be considered. If the creator of the work is deprived of a sale, then there is likely an infringement.

In addition to the problem presented by an unauthorized reproduction, the researcher must determine whether adding hyperlinks for purposes of explanation or illumination is legal. Since the copyright law provides the copyright owner with the exclusive right to create derivative works, it is important to consider how the law defines "derivative work."

The copyright law defines a "derivative work" as:

"a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

17 USC § 101.

It is, therefore, apparent that the addition of hyperlinks to add definitions, examples, illustrations, and the like would be the creation of a derivative work and likely an infringement.

Another example of a derivative work is the modern fad of the Internet Meme, in which captions are placed on pictures or pictures are superimposed on other pictures.

Thus, the creative scholar who finds an interesting article on the Web and decides to adopt that work without first obtaining permission is likely infringing the rights of the work's copyright owner in two ways. Even if the copy is considered a "fair use," the researcher would still have to overcome another obstacle, since the addition of hyperlinks to the article is likely to be considered the creation of a derivative work, thus compounding the infringing activity. The scholar would be well advised to seek permission before engaging in these activities since the consequences of infringing another's copyright-protected work can be serious.

While the World Wide Web provides a great deal of opportunities, it also presents a host of challenges. Balancing the rights of those who create copyrightable work with the rights of those who desire to exploit materials they find online is a modern challenge. Scholars are now responsible not only for developing innovative projects, but they must also determine whether their innovations are legal in order to protect themselves from liability.

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